Supreme Court, U.S.
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No. 98-53

In The

Supreme Court of the United States

October Term, 1997

MICHAEL C. GOLD,

Petitioner,

vs.

CITY OF MIAMI, a Florida municipal corporation; CALVIN ROSS, Individually; RAFAEL SUAREZ, Individually; JORGE PEREZ, Individually; and WILLIAM CAMPBELL, Individually,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Constitutional and Statutory Provisions Involved 1

Statement of the Case 1

Reasons for Denying the Writ 3

I. The Decision Below Represents A Correct Application Of The Analytical Framework And Legal Standard For Determining Qualified Immunity Entitlement As Established By This Court. 4

II. The Court Of Appeals Correctly Applied The "Clearly Established" Standard. 9

III. The Decision Below Is Not In Direct Conflict With Decisions Of Other Courts Of Appeal. 14

Conclusion 15

TABLE OF CITED AUTHORITIES

Page

Cases Cited:

Anderson v. Creighton, 483 U.S. 635 (1987) 5, 9, 13

Bradshaw v. State, 286 So. 2d 4 (Fla. 1973) 7, 11

Cinelli v. Cutillo, 896 F.2d 650 (1st Cir. 1990) 8

C.J.R. v. State, 429 So. 2d 753 (Fla. 1st DCA 1983) 12

Davis v. Scherer, 468 U.S. 183 (1984) 5

Delaney v. State, 489 So. 2d 891 (Fla. 1st DCA 1986) 12

Gonzales v. City of Belle Glade, 287 So. 2d 669 (Fla. 1973) 7, 10

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 4, 5, 9, 13

Hunter v. Bryant, 502 U.S. 224 (1991) 5

Knox v. Southwest Airlines, 124 F.3d 1103 (9th Cir. 1997) 8

K.Y.E. v. State, 557 So. 2d 956 (Fla. 1st DCA 1990) 12

Malley v. Briggs, 475 U.S. 335 (1986) 5, 9

Table of Cited Authorities

Page

Mitchell v. Forsyth, 472 U.S. 511 (1985) 5, 9, 13

Morris v. State, 335 So. 2d 1 (Fla. 1976) 7, 10, 11

Post v. City of Fort Lauderdale, 7 F.3d 1552 (11th Cir. 1993) 9

Saldana v. Garza, 684 F.2d 1159 (5th Cir. 1982) 13, 14

Sherman v. Four County Counseling Center, 987 F.2d 397 (7th Cir. 1993) 8

State v. Saunders, 339 So. 2d 641 (Fla. 1976) 7

Swint v. City of Wadley, Ala., 5 F.3d 1435 (11th Cir. 1993), *opinion modified*, 11 F.3d 1030 (1994), *cert. denied*, 514 U.S. 1003 (1995) 9

United States v. Lanier, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) 13, 14

Washington v. Starke, 855 F.2d 346 (6th Cir. 1988) 8

White v. State, 330 So. 2d 3 (Fla. 1976) 7, 11, 12

Statutes Cited:

42 U.S.C. § 1983 1

Section 877.03, Florida Statutes (1994) 1, 2, 7, 10

Table of Cited Authorities

Page

United States Constitution Cited:

First Amendment 1, 2, 3, 6, 7, 12, 14

Fourth Amendment 1, 2, 5, 8, 9

Fifth Amendment 1

Sixth Amendment 8

Fourteenth Amendment 1, 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions presented by petitioner, this case involves section 877.03, Florida Statutes (1994), which defines disorderly conduct as follows:

> Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor of the second degree punishable as provided in Sec. 775.082 or Sec. 755.083.

STATEMENT OF THE CASE

On October 18, 1991, City of Miami police officers arrested Petitioner Michael Gold for disorderly conduct for creating a disturbance in the parking lot of a bank. An account of the relevant facts surrounding the arrest, which were gleaned from the record by the Court of Appeals and stated in the panel opinion (App. 2-3), are quoted in the petition.

Gold sued the City of Miami, Calvin Ross, former Chief of Police, and the three arresting officers for violation of his First, Fourth, Fifth and Fourteenth Amendment rights pursuant to 42 U.S.C. § 1983. The individual defendants asserted the affirmative defense of qualified immunity and moved for summary judgment on that ground. The district court denied summary judgment, and defendants sought review by interlocutory appeal to the United States Court of Appeals for the Eleventh Circuit.

The issue presented to the Court of Appeals was whether, on the facts construed in the light most favorable to Gold, the defendant police officers had arguable probable cause to arrest Gold for disorderly conduct under section 877.03, Florida Statutes (1994), so as to be entitled to qualified immunity against Gold's claim that the officers violated his First and Fourteenth Amendment rights[1].

The Court of Appeals examined decisions of the Florida Supreme Court and those of appellate courts of Florida prior to October, 1991, in which the state's disorderly conduct statute was interpreted in light of constitutionally protected First Amendment rights. The Court's review of the applicable law revealed that the limitations which the Florida Supreme Court had imposed on the construction of the disorderly conduct statute to avoid violations of constitutionally protected speech were subject to subjective interpretation of the specific facts and circumstances of each case, and that a court's determination of the point at which constitutionally protected speech left off and legally proscribed disorderly conduct began depended, to a large extent, on the words used, the tone used, the decibels used, and the reaction of others. This fact-intensive inquiry had resulted in a number of decisions of appellate courts in Florida reflecting varying, if not disparate views of what constituted legally proscribed disorderly conduct.

It was undisputed that Gold had, at the very least, used profanities two times, in a loud voice, in a public place and in the presence of others (App. 8). No cases clearly established on those facts that Gold's conduct did not constitute legally proscribed disorderly conduct. In light of then existing law, a reasonable officer in the same circumstances and possessing the

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1. The Court of Appeals also considered Gold's Fourth Amendment excessive force claim and determined that the officers were entitled to qualified immunity on that claim as well.

same knowledge *could* have reasonably believed that probable cause existed to make the arrest. The Court of Appeals, therefore, concluded that the individual arresting officers and the former Chief of Police were entitled to qualified immunity on Gold's First Amendment and other federal claims and reversed the district court's denial of their motion for summary judgment. Gold's petition for rehearing en banc was denied, Judge Barkett dissenting.

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision is plainly correct and based on the established analytical framework and legal standard for determining whether government officials performing discretionary functions are to be protected from civil litigation and damage liability by qualified immunity when confronted with claims of constitutional violations. State court decisions interpreting Florida's disorderly conduct statute where constitutionally protected speech was involved were both relevant and appropriate as a source for determining whether the arresting officers violated clearly established law.

It is the fact-intensive nature of the constitutional inquiry required when local disorderly conduct law is balanced against First Amendment rights which largely accounts for the case-by-case approach and often varying views both within and among the circuits as to what constitutes legally proscribed disorderly conduct. The decision below is not in direct conflict with decisions of other courts of appeal as to the underlying legal standards applicable to qualified immunity analysis. For these reasons, certiorari review of the decision below is unwarranted.

I.

THE DECISION BELOW REPRESENTS A CORRECT APPLICATION OF THE ANALYTICAL FRAMEWORK AND LEGAL STANDARD FOR DETERMINING QUALIFIED IMMUNITY ENTITLEMENT AS ESTABLISHED BY THIS COURT.

The point of departure for qualified immunity analysis is set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), in which this Court held that qualified immunity shields government officials performing discretionary functions from civil liability if their conduct violates no "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Noting the desired effect which the objective reasonableness test would likely have in eliminating insubstantial claims against government officials at the summary judgment stage, this Court emphasized the importance of a judge's role in evaluating a government official's entitlement to qualified immunity to determine whether the law was so clearly established at the time the action occurred that the official could fairly be said to "know" that his conduct was unlawful:

> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the current applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to

> "know" that the law forbade conduct not previously identified as unlawful. *Id*, at 818.

In *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), this Court reaffirmed the principles of qualified immunity established in *Harlow* and in other cases such as *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law") and *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) (officials are immune unless "the law clearly proscribed the actions" they took), cautioning that in order for the right the official is alleged to have violated to have been "clearly established", "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." "[I]n the light of pre-existing law, the unlawfulness must be apparent." *Id.*

In discussing in *Anderson* the applicability of the qualified immunity defense against a Fourth Amendment violation claim in the case of a warrantless search of an individual's home without probable cause, this Court recognized that an arrest may be objectively reasonable even in the absence of probable cause and that

> it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and . . . that in such cases those officials — like other officials who act in ways they reasonably believe to be lawful — should not be held personally liable.

Id. at 641. "This accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (quoting *Davis v. Scherer*, 468 U.S. 183, 196 (1984)).

The Court of Appeals applied this objective standard of "arguable probable cause" to Gold's arrest under the facts and circumstances viewed in the light most favorable to Gold. The narrow focus of the inquiry was to determine whether a reasonable officer with the same knowledge and under the same circumstances *could* have reasonably believed that probable cause existed for arresting Gold for committing disorderly conduct in light of well-established law.[2]

A review of the law involving the construction and application of Florida's disorderly conduct statute in cases where constitutionally protected speech was at issue, as that law existed at the time of Gold's arrest, compelled the conclusion that there was no clear line drawn between lawful and unlawful disorderly conduct. On the contrary, the cases reflected disparate views and opinions among courts in Florida as to what constituted legally proscribed disorderly conduct where speech was a component of the alleged misconduct and that each case had been decided on its own specific facts and circumstances. No cases gave the officers fair warning that uttering profanities twice in a loud voice in a public place and in the presence of other people did not constitute legally proscribed conduct. Accordingly, the Court of Appeals correctly concluded that the officers had arguable probable cause to arrest Gold and, therefore, were entitled to qualified immunity.

Petitioner contends that the Court of Appeals omitted a necessary step in its analysis by failing to explore or discuss First Amendment doctrine as a preliminary inquiry "to identify the contours of the right said to have been violated." However, an in-depth discussion of First Amendment protected speech in the context of arrests under federal law, by itself, was not essential to the court's qualified immunity analysis, as it would not have

2. There was no dispute that the officers who arrested Gold were acting within their discretionary authority (App. 5, n. 4).

squarely addressed or fully answered the central inquiry of whether the arresting officers had "arguable" probable cause for the disorderly conduct arrest of Gold under section 877.03, Florida Statutes. The issue of whether Gold was, in fact, arrested unjustly was not relevant to the arguable probable cause analysis. The Court of Appeals acknowledged that the City police officers did not have actual probable cause for the arrest (App. 8). Nor was the constitutional validity of Florida's disorderly conduct statute under attack. The narrow focus of the inquiry was whether a reasonable officer with the same knowledge and under the same circumstances could have believed that Gold's conduct in a public place, taken with the words he uttered, the tone and volume with which he uttered them and the reaction of those around him, was unlawful disorderly conduct pursuant to the statute.

For these same reasons, Petitioner's contention that it was incorrect for the Court of Appeals to eschew federal First Amendment law in favor of state law decisions to evaluate whether the law was "clearly established" is also without merit. Prior to Gold's arrest, the Florida Supreme Court had upheld the constitutionality of section 877.03, Florida Statutes, against challenges of overbreadth and vagueness in light of federal First Amendment law, construing the language of the statute narrowly so as to balance the competing interests between the protection of an individual citizen's constitutional right of freedom of speech and the public's right to the maintenance of social order. *See Bradshaw v. State*, 286 So. 2d 4 (Fla. 1973); *Gonzales v. City of Belle Glade*, 287 So. 2d 669 (Fla. 1973); *White v. State*, 330 So. 2d 3 (Fla. 1976); *Morris v. State*, 335 So. 2d 1 (Fla. 1976); *State v. Saunders*, 339 So. 2d 641 (Fla. 1976). Also reported prior to October, 1991, were a number of decisions of Florida appellate courts applying the Supreme Court's decisions regarding construction of the statute to various fact patterns involving protected speech violation claims. These state court

decisions interpreting the state's disorderly conduct statute in light of constitutionally protected speech most closely related to and most directly governed the conduct of the state law enforcement officers as they carried out their day to day responsibilities. It is difficult to contemplate a more relevant or appropriate source of reference for determining whether state police officers violated "clearly established" law in arresting Gold under the statute.

Other circuits have not hesitated to call upon state court decisions to determine whether defendants in section 1983 actions have violated clearly established law, when the circumstances so dictate. *See, e.g., Knox v. Southwest Airlines*, 124 F.3d 1103, 1108-09 (9th Cir. 1997) (triable issue of fact as to whether police officers had probable cause to arrest defendant under Arizona's trespass or disorderly conduct statute as interpreted by state law precluded summary judgment on qualified immunity); *Sherman v. Four County Counseling Center*, 987 F.2d 397, 402 (7th Cir. 1993) (police officer who obeyed facially valid Indiana statutes governing involuntary detention and treatment of persons believed to be mentally ill and dangerous entitled to qualified immunity against claim of Fourth Amendment violation); *Cinelli v. Cutillo*, 896 F.2d 650, 654-655 (1st Cir. 1990) (in holding that defendants were not entitled to qualified immunity, court relied on decision of Massachusetts Superior Judicial Court to have "clearly outlined the contours of a defendant's constitutional [right to counsel under the Sixth Amendment] for Massachusetts police officers"); *Washington v. Starke*, 855 F.2d 346, 348 (6th Cir. 1988) (police officer entitled to qualified immunity in view of existing federal and state law permitting use of deadly force against fleeing felony suspects).

Needless to say when the defendant's conduct can be evaluated under clearly established federal law, the Eleventh

Circuit Court of Appeals relies exclusively on federal decisions. *See, e.g., Swint v. City of Wadley, Ala.*, 5 F.3d 1435 (11th Cir. 1993), *opinion modified*, 11 F.3d 1030 (1994), *cert. denied*, 514 U.S. 1003 (1995) (no arguable probable cause found and police officers not entitled to qualified immunity in the face of Fourth Amendment and equal protection violation claims in raiding nightclub, where the United States Supreme Court had clearly established in analogous circumstances the constitutional impropriety of the warrantless search and seizure of occupants carried out by the police officers in conducting the raids).

II.

THE COURT OF APPEALS CORRECTLY APPLIED THE "CLEARLY ESTABLISHED" STANDARD.

Consistent with this Court's holdings in *Harlow*, *Malley*, *Mitchell* and *Anderson*, the Eleventh Circuit Court of Appeals has adopted a "bright line" test for determining whether the law is *clearly established* when qualified immunity is asserted. As set forth in *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993):

> To show the law is clearly established, a plaintiff cannot rely on "general, conclusory allegations" or "broad legal truisms." *Barts v. Joyner*, 865 F.2d 1187, 1190 (11th Cir. 1989); *see Adams v. St. Lucie County Sheriff's Dept.*, 962 F.2d 1563, 1574-75 (11th Cir. 1992) (Edmondson, J., dissenting), *approved en banc*, 998 F.2d 923 (11th Cir. 1993); *Muhammad v. Wainwright*, 839 F.2d 1422, 1424 (11th Cir. 1987). Instead, the burden is on the plaintiff to show that, when the defendant acted, the law established the contours of a right so clearly that a reasonable official would have understood his acts were unlawful. *See Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523 (1987).

> The line between lawful and unlawful conduct is often vague. *Harlow*'s "clearly established" standard demands that a bright line be crossed. The line is not found in abstractions — to act reasonably, to act with probable cause, and so on — but in studying how these abstractions have been applied in concrete circumstances. If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant. *See Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989) (discussing qualified immunity and the First Amendment).

At the time of Gold's arrest, the law was not clearly established in concrete factual terms that Gold's actions did not constitute legally prohibited disorderly conduct. There was no bright line drawn between lawful and unlawful conduct. The arresting officers *could* have reasonably believed that probable cause existed for the arrest.

As the Court of Appeals points out (App. 6-7), the Florida Supreme Court has reversed convictions for disorderly conduct where a defendant used profane language to police officers in the presence of other persons, *see Morris v. State*, 335 So. 2d at 2, and where defendants made threatening comments to police officers and used "intemperate expletives in their presence, *see Gonzales v. City of Belle Glade*, 287 So. 2d at 670-71. The holdings of these cases make clear that conviction under section 877.03, Florida Statutes, requires more than just offensive or profane language or other verbal expression of outrage which may be annoying or offensive to those present.

However, in these cases and in others, the Florida Supreme Court also instructs that

> in determining the narrow line between constitutionally protected speech and that which is unprotected, it is imperative to consider the circumstances in which the words were uttered.

White v. State, 330 So. 2d at 5, citing *Bradshaw v. State*, *supra.* The point at which conduct goes beyond the bounds of speech and becomes disorderly depends on the degree of loudness, and the circumstances under which the words are uttered. *See Morris*, 335 So. 2d at 2 (quoting *White*, 330 So. 2d at 6).

To illustrate the divergent views of Florida courts concerning what constitutes legally proscribed disorderly conduct, the Court of Appeals points to two cases which were decided by the same appellate court, each reaching different conclusions from remarkably similar facts:

> In one case, a Florida appellate court affirmed the disorderly conduct conviction of a juvenile who directed profanities at a police officer in a loud voice and in the presence of others. *See L.J.M. v. State*, 541 So. 2d 1321, 1322-23 (Fla. 1st DCA 1989). According to the court, "[i]f this country is to preserve in its citizens any sense of discipline and respect for others in our society, the [F]irst [A]mendment simply cannot be construed to condone this type of conduct." *See id.* at 1323. In another case, the same appellate court reversed a delinquency adjudication based on disorderly conduct of a juvenile who leaned from a car window and yelled unprovoked profanities at nearby police officers. *See D.C.E. v. State*, 381 So. 2d 1097, 1098-99 (Fla. 1st DCA 1979) (App. 7).

There are other striking examples of the appellate court's fact-sensitive, case-by-case approach in deciding where

protected speech ends and disorderly conduct begins. In *C.J.R. v. State*, 429 So. 2d 753 (Fla. 1st DCA 1983), the appellate court affirmed the trial court's determination that the defendant was properly adjudicated delinquent of disorderly conduct for shouting "Fuck this shit * * *, you mother fucker" at a police officer and interrupting the officer's investigation of an accident involving the defendant's car. Finding the language used to be legally as well as socially unacceptable, the court determined that "the loudness and circumstances in which the obscene language was used remove[d] the language from First Amendment protection," citing *White*, *supra*. *C.J.R.*, 429 So. 2d at 754. The same court upheld a conviction for disorderly conduct in a case where the defendant called a police officer a "fucking yankee" and yelled other obscenities at the officer, interrupting the officer's investigation of a fight between two suspects by being loud and abusive. *Delaney v. State*, 489 So. 2d 891, 892 (Fla. 1st DCA 1986). Yet, in *K.Y.E. v. State*, 557 So. 2d 956 (Fla. 1st DCA 1990), the court concluded that the speech and conduct of a juvenile who continually sang "Fuck the police," after she repeatedly interrupted an officer's conversation with another individual, fell within the protections afforded by the First Amendment.

Given the unpredictability of the outcome of these cases, the Court of Appeals applied the correct "clearly established" standard in concluding that no bright line had been staked out between lawful and unlawful disorderly conduct where protected speech was concerned, and a reasonable officer in the same circumstances and possessing the same knowledge as the officers in this case could have reasonably believed that probable cause existed for arresting Gold for disorderly conduct on the facts established in the record. Surely, if appellate judges were unable to agree consistently as to what constituted legally proscribed disorderly conduct when First Amendment protected speech was involved, it would have been unreasonable to expect a

police officer to have known, in the absence of clearly established law on substantially identical facts, that his arrest of a person for disorderly conduct violated that person's constitutional rights.

In granting qualified immunity to a police officer who made an arrest without probable cause in the case of *Saldana v. Garza*, 684 F.2d 1159, 1165 (5th Cir. 1982), the Fifth Circuit Court of Appeal stated:

> Police officers can be expected to have a modicum of knowledge regarding the fundamental rights of citizens. Lawlessness will not be allowed to pervade our constabularies. However, in holding our law enforcement personnel to an objective standard of behavior, our judgment must be tempered with reason. If we are to measure official action against an objective standard, it must be a standard which speaks to what a reasonable officer should or should not know about the law he is enforcing and the methodology of effecting its enforcement. Certainly we cannot expect our police officers to carry surveying equipment and a Decennial Digest on patrol; they cannot be held to a title-searcher's knowledge of metes and bounds or a legal scholar's expertise in constitutional law.

Petitioner says that the decision below reflects the Court of Appeals' insistence on virtually identical facts in prior cases in order for the law to be "clearly established", and that this test demands more than the "fair warning" standard established by this Court in *Harlow*, *Anderson*, *Mitchell*, and, most recently, in *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997). However, *Lanier* makes it clear that the level of specificity required is not the same in every case, and while, in some instances, a general statement of

the law may be sufficient to give fair and clear warning, in other circumstances, ". . . a very high degree of prior factual particularity may be necessary." (Citations omitted). 117 S. Ct. at 1227.

In the instant case, general rules of federal constitutional law regarding First Amendment protected speech in arrest cases, even if clearly established at the time Gold was arrested and even if known to the arresting officers, would not have given the officers sufficiently fair and clear warning that Gold's conduct did not constitute unlawful disorderly conduct under Florida's disorderly conduct statute.

III.

THE DECISION BELOW IS NOT IN DIRECT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL.

No direct conflict with other circuits as to the analytical framework or legal standard governing qualified immunity analysis is demonstrated in the cases cited by Petitioner on page 17 of the petition. Each case turns on its own unique set of facts. Not a single case involves facts which are sufficiently analogous to the facts and circumstances surrounding Gold's arrest to permit meaningful comparison with respect to the application of the "clearly established" test.

Moreover, since none of the cases from other jurisdictions involves — or could involve — qualified immunity analysis in circumstances in which an alleged violation of First Amendment protected speech is examined in the context of an arrest under Florida's disorderly conduct statute, any perceived conflict between the decision below and decisions from other circuits is untenable.

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

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